Pendaftar Hakmilik Pejabat Tanah dan Galian Selangor & Anor v Lau Yong Ying

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(NCVC)(W)-141–03 OF 2019
KAMARDIN HASHIM, KAMALUDIN MD SAID AND LEE SWEE SENG JJCA
27 FEBRUARY 2020

Damages — Assessment — Appeal against assessment — Respondent purchased property through auction — First appellant as registrar of land title failed to endorse notice of seizure of land prior to bidding of property — Respondent successfully brought negligence action against appellants — Court of Appeal remitted case to High Court for assessment of damages — High Court held that respondent entitled to all of her claims — Whether finding on assessment of damages erroneous and respondent's claims wholly baseless, without sufficient evidence, unreasonable and contained element of double counting — Whether learned judge acted on wrong principle of law, misapprehended the facts and made a wholly erroneous estimate of damages

The respondent in the present case had successfully bid for a property ('the property') in a public auction. Problems arose when it was found that the property had been seized by the Malaysian police, prior to her successfully bidding for the same. The respondent brought an action for negligence against the first appellant for its failure to endorse notice of seizure on the title of the property. The High Court had dismissed the respondent's action however the said decision was reversed by the Court of Appeal. The Court of Appeal ordered the case to be remitted to the High Court for assessment of damages. The respondent claimed for 10% deposit of the auction price; loss of profit for resale of property; monthly payment to Alliance Islamic Bank; stamp duty; redemption sum for the loan financing from Alliance Islamic Bank; maintenance, assessment and insurance premiums; and legal fees. At the end of the case, the learned High Court judge held that the respondent was entitled to all her claims with the total amount awarded was RM9,396,088.86. Aggrieved by the decision of the learned judge, the appellants filed the present appeal. The issue to be considered was whether the finding on the assessment of damages was erroneous and that the respondent's claims were wholly baseless, without sufficient evidence, unreasonable and contained an element of double counting.

Held, allowing the appeal in part with costs of RM5,000 to the appellants:

(1) The respondent was not entitled to the claim for the 10% deposit of RM351,000. The court found that the amount pleaded, prayed for and the evidence given were different which gave rise to confusion. Further, the redemption statement issued by a bank officer (exh SK3) which was relied upon by the learned trial judge to allow this claim was not related to the 10% deposit amount of the auctioned property. In addition, this claim was awarded without due regard to the other claim by the respondent for the loss of profit on the resale of the property. If both claims were allowed, it would profit the respondent which the law did not allow. There was no loss and without paying the 10% deposit the respondent would not be entitled to bid for the property. The assessments made by the learned judge on this claim was without any basis and wrong (see para 33(a)).

(2) The selling price by respondent and purchase price accepted by the buyer at RM7.2m was a price of a willing seller and willing buyer situation. However, the respondent only claimed the amount less her purchase price. The court held that, when the respondent bought the property at RM3.5m (RM3.15m) for investment, later lost it on the negligence of the appellants, then the loss in value of the property requested at RM3.69m was a very reasonable amount which must be granted as compensation. Further, s 51(2) and (3) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 was a mandatory provision. In this case, it was the appellants who had failed to enter such endorsement. In effect it was their duty as the registrar of land title conferred with the power to make such entry. Therefore, the argument that there was no foreseeability of the matter which gave rise to a claim for compensation and damages was without justification and misconceived (see para 33(b)).

(3) There was no reason or explanation given in the learned judge's grounds of judgment on why he awarded the claim for monthly payment to the bank and outstanding balance of financing with the bank. Clearly there was no assessment made on these two claims. The claim for monthly payment to the bank was not justified because the said claim was the respondent's own obligation under the loan facility agreement in order to purchase the property. In respect of the claim for outstanding balance of financing with bank, there was no evidence that the respondent had made such payments or had redeemed the property (see para 33(c)–(d)).

(4) The court agreed with the appellants that the respondent had made a double claim for stamp duty on the purchase of the property. This amount already included in the lawyer's bill dated 12 September 2012. Therefore, it should not be awarded separately. It would remain as the amount claim under the payment for lawyers' fee (see para 33(e)).

(5) The court agreed with the appellants' submission that the costs for maintenance of the property must be rejected on ground that all the related documents were from 1990–December 2013 when the property was only acquired by the respondent in 2012. An award of damages could not be blatantly given without ascertaining whether the respondent was entitled to the amount claimed in the first place, otherwise it may wrongly enrich the respondent and caused injustice to the appellants (see para 33(f)).

(6) The court affirmed the award by the learned judge in relation to legal fees amounting to RM1,172,791.26 because the amount had been agreed between the respondent and her lawyer to do the legal work for her. The lawyers' invoices at pp 206–214 clearly showed that the invoices were addressed to her which means she has to pay or had paid the amount stated in the invoices (see para 33(g)).

(7) The court was satisfied that the learned judge had acted on a wrong principle of law, misapprehended the facts, made a wholly erroneous estimate of the damage suffered on certain claims as deliberated above and as such, there was merit in the appeal. Based on the above reasonings, the respondent was only entitled to claim for loss of profit in the amount of RM3.69m and the payment of legal fees in the amount of RM1,172,791.26 whereby the whole amount of damages awarded to the respondent was RM4,862,791.26 (see para 34).

[Bahasa Malaysia summary

Responden dalam kes ini telah berjaya membida hartanah ('hartanah tersebut') dalam lelongan awam. Masalah timbul apabila didapati bahawa hartanah tersebut telah dirampas oleh polis Malaysia, sebelum responden berjaya membida hartanah tersebut. Responden memfailkan tindakan kecuaian terhadap perayu pertama kerana gagal mengendors notis penyitaan ke atas dokumen hak milik hartanah tersebut. Mahkamah Tinggi telah menolak tindakan responden namun keputusan tersebut dibatalkan oleh Mahkamah Rayuan. Mahkamah Rayuan memerintahkan kes tersebut dikembalikan ke Mahkamah Tinggi untuk penilaian ganti rugi. Responden menuntut deposit sebanyak 10% dari harga lelong; kehilangan keuntungan untuk penjualan semula hartanah tersebut; pembayaran bulanan kepada Alliance Islamic Bank; duti setem; jumlah penebusan untuk pembiayaan pinjaman dari Alliance Islamic Bank; premium penyelenggaraan, penilaian dan insurans; dan yuran guaman. Di akhir kes, hakim Mahkamah Tinggi yang bijaksana berpendapat bahawa responden berhak ke atas semua tuntutannya dengan jumlah yang diberikan adalah RM9,396,088.86. Terkilan dengan keputusan hakim yang bijaksana, perayu memfailkan rayuan semasa. Isu yang harus dipertimbangkan adalah sama ada dapatan penilaian ganti rugi tersebut adalah salah dan bahawa tuntutan responden sama sekali tidak berasas, tanpa keterangan yang mencukupi, tidak masuk akal dan mengandungi unsur pengiraan berganda.

Diputuskan, membenarkan sebahagian rayuan dengan kos RM5,000 kepada perayu-perayu:

(1) Responden tidak berhak ke atas tuntutan deposit 10% berjumlah RM351,000. Mahkamah mendapati bahawa jumlah yang diplidkan, dimohon dan keterangan yang diberikan adalah berbeza yang menimbulkan kekeliruan. Selanjutnya, pernyataan penebusan yang dikeluarkan oleh pegawai bank (eksh SK3) yang dirujuk oleh hakim bicara yang bijaksana untuk membenarkan tuntutan ini tidak berkaitan dengan jumlah deposit 10% dari hartanah yang dilelong. Sebagai tambahan, tuntutan ini diberikan tanpa mengambil kira tuntutan lain oleh responden atas kehilangan keuntungan dari penjualan semula hartanah. Sekiranya kedua-dua tuntutan itu dibenarkan, itu akan memberi keuntungan kepada responden yang tidak diizinkan oleh undang-undang. Tidak ada kerugian di sini dan tanpa membayar deposit 10%, responden tidak berhak membida hartanah tersebut. Penilaian yang dibuat oleh hakim yang bijaksana mengenai tuntutan ini adalah tanpa asas dan salah (lihat perenggan 33(a)).

(2) Harga jualan oleh responden dan harga belian yang diterima oleh pembeli pada harga RM7.2 juta adalah harga yang dipersetujui oleh penjual dan pembeli. Walau bagaimanapun, responden hanya menuntut perbezaan dari jumlah tersebut dan harga beliannya. Mahkamah berpendapat bahawa, apabila responden membeli hartanah tersebut dengan harga RM3.5 juta (RM3.15 juta) untuk pelaburan, kemudian dia telah kehilangan hartanah tersebut atas kecuaian perayu, maka kerugian nilai hartanah yang dimohon pada harga RM3.69 juta adalah sangat wajar dan jumlah tersebut mesti diberikan sebagai pampasan. Selanjutnya, s 51(2) dan (3) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 adalah peruntukan wajib. Dalam kes ini, perayu-perayu yang telah gagal memasukkan pengendorsan tersebut. Pada hakikatnya, adalah tugas mereka sebagai pendaftar hak milik tanah yang diberi kuasa untuk memasukkan pengendorsan tersebut. Oleh itu, hujah bahawa tidak terdapat jangkaan bagi perkara yang menimbulkan tuntutan pampasan dan ganti rugi adalah tanpa justifikasi dan salah (lihat perenggan 33(b)).

(3) Tidak ada alasan atau penjelasan yang diberikan dalam alasan penghakiman hakim yang bijaksana tentang mengapa beliau membenarkan tuntutan pembayaran bulanan kepada bank dan baki pembiayaan tertunggak dengan bank. Jelas tidak ada penilaian yang dibuat terhadap kedua-dua tuntutan ini. Tuntutan pembayaran bulanan kepada bank tidak dibenarkan kerana tuntutan tersebut adalah kewajiban responden sendiri berdasarkan perjanjian kemudahan pinjaman untuk membeli hartanah tersebut. Berkenaan dengan tuntutan baki pembiayaan dengan bank, tidak ada keterangan bahawa responden

telah melakukan pembayaran tersebut atau telah menebus harta tersebut (lihat perenggan 33(c)–(d)).

(4) Mahkamah bersetuju dengan perayu-perayu bahawa responden telah membuat tuntutan berganda untuk duti setem atas pembelian hartanah tersebut. Jumlah ini sudah termasuk dalam yuran peguam bertarikh 12 September 2012. Oleh itu, ia tidak boleh diberikan secara berasingan. Ia tetap sebagai jumlah tuntutan di bawah pembayaran untuk yuran peguam (lihat perenggan 33(e)).

(5) Mahkamah bersetuju dengan hujahan perayu-perayu bahawa tuntutan kos penyelenggaraan hartanah harus ditolak dengan alasan bahawa semua dokumen yang berkaitan adalah dari tahun 1990 hingga Disember 2013 sedangkan hartanah tersebut hanya diperoleh oleh responden pada tahun 2012. Pemberian ganti rugi tidak boleh diberikan sewenang-wenangnya tanpa terlebih dahulu memastikan sama ada responden berhak ke atas jumlah yang dituntut, jika tidak, ia mungkin akan memperkaya responden secara salah dan menyebabkan ketidakadilan terhadap perayu-perayu (lihat perenggan 33(f)).

(6) Mahkamah mengesahkan award oleh hakim yang bijaksana berkenaan dengan yuran guaman berjumlah RM1,172,791.26 kerana jumlah tersebut telah dipersetujui antara responden dan peguamnya untuk melakukan kerja undang-undang untuknya. Invois peguam di ms 206–214 dengan jelas menunjukkan bahawa invois tersebut ditujukan kepadanya, yang bermaksud dia harus membayar atau telah membayar jumlah yang dinyatakan dalam invois tersebut (lihat perenggan 33(g)).

(7) Mahkamah berpuas hati bahawa hakim yang bijaksana telah bertindak berdasarkan prinsip undang-undang yang salah, salah memahami fakta, membuat anggaran yang benar-benar salah mengenai kerugian yang dialami pada tuntutan tertentu seperti yang dibahas di atas dan dengan demikian, terdapat merit dalam rayuan. Berdasarkan alasan-alasan di atas, responden hanya berhak menuntut kerugian keuntungan berjumlah RM3.69 juta dan pembayaran yuran guaman berjumlah RM1,172,791,26 di mana keseluruhan jumlah ganti rugi diberikan kepada responden berjumlah RM4,862,791.26 (lihat perenggan 34).]

Cases referred to

Anglia Television Ltd v Reed [1971] 3 All ER 690; [1972] 1 QB 60, CA (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)
Davies and Another v Powell Duffryn Associated Collieries Ltd [1942] 1 All ER 657; [1942] AC 601, HL (refd)
Liew Choy Hung v Shah Alam Properties Sdn Bhd [1997] 2 MLJ 309; [1997] 2 CLJ 601, SC (refd)

Mechanical and General Inventions Co, Ltd, and Lehwess v Austin and The Austin Motor Co, Ltd [1935] All ER Rep 22; [1935] AC 346, HL (refd)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Sambaga Valli KR Ponnusamy v Datuk Bandar Kuala Lumpur & Another Appeal [2017] 1 LNS 500, CA (refd)
Sime UEP Properties Bhd v Woon Nyoke Lin [2002] 3 CLJ 719, CA (refd)
Subramaniam a/l Paramasivam & Ors v Malaysian Airlines System Bhd [2002] 1 MLJ 45; [2002] 1 CLJ 230, HC (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 8 MLJ 713; [2012] 3 CLJ 271, HC (refd)
Yeoh Eng Kong v Choo Kok Yeow & Anor [2019] 9 MLJ 112; [2018] 1 LNS 808, HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 51(2), (3), 61
Courts of Judicature Act 1964 s 69
National Land Code
Rules of Court 2012 O 59 r 1

Appeal from: Civil Suit No 21NCVC-25–06 of 2015 (High Court, Shah Alam)

Siti Fatimah Talib (Selangor State Legal Advisor's Office) for the appellant.
Americk Sidhu (Americk Sidhu) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] This is the appellants' (defendants in the court below) appeal against the decision of the learned High Court judge ('the learned judge') delivered on the 20 February 2019 in respect of an award for damages only.

[2] The appellants were found negligent by virtue of a decision of this court made on the 29 August 2018 (in which the decision of the high court dismissing the respondent's (plaintiff in the court below), claim for negligence was reversed). The matter was then ordered to be remitted to the High Court for an assessment of damages before the learned judge.

[3] The said assessment of damages was thereafter attended to by the learned judge and an award eventually made. The respondent was awarded damages in the total sum of RM9,396,088.86 together with interests of 5% from the date

of filing the writ to date of payment and costs of RM3,000 to be paid to the respondent subject to allocatur.

THE BACKGROUND FACTS

[4] The respondent had successfully bid for a property at a public auction held under the auspices of the Shah Alam High Court in June 2012.

[5] This property was a 16,000 sqft bungalow in the prestigious neighbourhood known as Country Heights, Kajang. It sat on a piece of land approximately 21,000 sqft in area. The auction price of the property is stated as RM3.51m. The respondent also claimed that she paid RM351,000 as 10% deposit.

[6] The respondent obtained a loan from the Alliance Islamic Bank to finance the purchase of the property for RM3,211,900.

[7] Before the transaction could be completed, the Bank of Punjab ('BOP') intervened, claiming ownership of the property by virtue of an AMLA vesting order. An originating summons ('OS'), was filed by the BOP in the Shah Alam High Court against, inter alia, both the appellants and the respondent. This OS was eventually successful. The respondent and the appellants appealed this decision all the way to the Federal Court. The appeals were unsuccessful.

[8] The learned judge of the Shah Alam High Court who heard this OS made a finding that the appellants were liable in negligence as part of the decision delivered.

[9] The reason why the appellants were found negligent is because they failed to endorse a notice of seizure on the title to the property after having been served with the same by the police.

[10] As it transpired, this property was purchased by a Pakistani criminal using proceeds he obtained by cheating the BOP. The Malaysian police were asked to assist in the recovery of the assets involved, this property being one of them.

[11] This is why the BOP had obtained a vesting order under s 61 of the AMLA. The respondent remained completely unaware of this vesting order, nor was she aware the property had been seized by the Malaysian police, prior to her successfully bidding for the same.

[12] Had the first appellant endorsed the notice of seizure on the title to the

property, none of this would have happened.

[13] The respondent suffered loss as a result of the appellant's negligence. She claims for loss of her property and all associated costs of acquiring it including payments of the bank loan, loss of the profit for re-sale of the property, lawyer's fees and other miscellaneous payments made to upkeep the property whilst litigation was ongoing.

THIS APPEAL

[14] The appellants submitted that the total amount awarded by the learned judge was wrong and erroneous for failing to give due consideration to the fact that the claim is wholly baseless, without sufficient evidence, unreasonable and contain an element of double counting. The appellants relied on the grounds stated in their written submission.

[15] The respondent on the other hand submitted that the award by the learned judge ought not to be disturbed as it was clearly made on sound legal principles applied to the evidence of loss made available through the viva voce evidence of witnesses on oath and the supporting documentation produced and marked as exhibits. The respondent also referred to her written submission.

[16] We considered the parties' submissions both oral and written. We made our decision which was unanimous that there is merit in the appeal. The appellants' appeal is partly allowed by reducing the damages from the total sum of RM9,396,088.86 awarded by the learned judge to the respondent to RM4,862.791.26 and costs of RM5,000 to the appellant. The order of the High Court is set aside and substituted with damages ordered by this court only as follows:

(a) *kehilangan atas nilai harta* RM3.6m; and

(b) *pembayaran yuran peguam jumlah* RM1,172,791.26
RM4,862,791.26

[17] The interest of 5% over the judgment sum from the date of filing the writ until full settlement will remain. We also awarded costs for this appeal to the appellants.

[18] We found there is no merit for other claims for the damages which were allowed by the learned judge. It is our finding that those claims for damages should not be allowed and we set aside the order of the learned judge.

A APPELLATE INTERFERENCE WITH AN AWARD FOR DAMAGES

[19] It is trite law that an appellate court would be extremely hesitant in interfering with an award for damages made by a lower court. As correctly pointed by the respondent, the House of Lords in *Davies and Another v Powell Duffryn Associated Collieries Ltd* [1942] 1 All ER 657; [1942] AC 601 (TAB-1, BOA). At p 616, Lord Wright had this to say:

> An Appellate Court is always reluctant to interfere with a finding of the trial Judge on any question of fact, but it is particularly reluctant to interfere with a finding of damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate
>
> ...

[20] Citing the decision in *Mechanical and General Inventions Co, Ltd, and Lehwess v Austin and The Austin Motor Co, Ltd* [1935] All ER Rep 22; [1935] AC 346, His Lordship commented as follows at p 616:

> Where however, the award is that of the Judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, *the Appellate Court is particularly slow to reverse the trial Judge on a question of the amount of damages.* It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v Lovell* [1935] 1 KB 354, 360. In effect the Court, before it interferes with an award of damages, should be satisfied that the Judge has acted on *a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.* It is not enough that there is a balance of opinion or preference. *The scale must go down heavily against the figure attacked if the Appellate Court is to interfere, whether on the ground of excess or insufficiency ...* (Emphasis added.)

[21] The decisions in *Davies* and *Flint* were followed in two local Federal Court decisions namely *Topaiwah v Salleh* [1968] 1 MLJ 284 (Azmi CJ) and *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214 (Wan Suleiman FJ).

[22] A recent decision of the Court of Appeal in *Sambaga Valli KR Ponnusamy v Datuk Bandar Kuala Lumpur & Another Appeal* [2017] 1 LNS 500 reminds us of the principles governing interference in an award of damages by an appellate court. Mohd Zawawi Salleh JCA (as he was then) in the judgment delivered made the following relevant observations:

> [7] Before we dwell upon the competing submissions advanced by the parties, it would be useful to remind ourselves of certain trite principles.
>
> [8] First, the Court of Appeal may interfere with the decision of a Judge in Chambers (in relation to an Appeal from the Registrar) but only on well-established

principles of appellate intervention (see *CM Van Stillevoldt BV v EL Carrier Inc* [1983] 1 WLR 207 at 208–209). The Court of Appeal may interfere with the quantum of damages awarded by the Judge only if it is shows (sic) that the latter:

(a) acted on the wrong principles;

(b) misapprehended the facts; and

(c) had for these or other reasons made a wholly erroneous estimate of his damages.

[10] Secondly, it is fundamental and tried that a Plaintiff claiming damages must prove his damage, ...

[11] Thirdly, the assessment of damages in action in this nature does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion to the judges .The fairness and reasonableness of the award cannot be subjected to any recognized test or measure by any certain standard. If the award is manifestly inadequate or excessive, or there are indications that the award was influenced by improper considerations or the mistake was too plain, the Appellate Court should not hesitate to remedy the trial court's error. All the courts should do are to award sums which is reasonable, moderate and conventional.

THE DAMAGES CLAIMED/AWARDED

[23] The learned judge summarised the respondent's claim for payment which was alleged to have incurred related to the said property as follows:

(a) 10% deposit of the auction price: RM351,000;

(b) loss of profit for resale of property: RM3.69m;

(c) monthly payments to Alliance Islamic Bank as at 3 December 2018: RM1,139,986.55;

(d) stamp duty: RM99,300;

(e) redemption sum for the loan financing from Alliance Islamic Bank as at 24 August 2017: RM2,912,272.01;

(f) maintenance, assessment and insurance premiums: RM30,739.04; and

(g) legal fees: RM1,172,791.26.

[24] The respondent gave evidence and tendered documents marked as exhs P1 to P11 to support the above claim. It was also stated that she had mitigated her loss.

[25] The appellants disputed the respondent's claim and the learned judge summarised the appellants' grounds as follows:

(a) the respondent is not entitled to the 10% deposit of RM351,000 on the ground that this amount must be paid to qualify her as a bidder in the auction sale. Since she had enjoyed the right to bid and eventually bought the property therefore, the amount cannot be claim as part of her loss. In other words, there is no loss and without paying the amount she would not be entitled to bid for the property;

(b) the loss of profit for resale of property cannot be claimed on the basis that the respondent's claim is more for wasted expenditure. The respondent can only claim the amount spent in order to buy the property or alternatively, the loss of profit is caused by her own fault by giving wrong representation to the buyer, Lai Siew Fah;

(c) for the monthly payment to the bank and redemption sum to settle the loan of the property, it should not happened because the registrar caveat and private caveat are registered on the property which is shown in the proclamation of sale however, the respondent went ahead to bid for the property. The respondent took the risk and the blame for the loss suffered cannot be put on the appellants' but by her own conduct and action;

(d) maintenance, assessment and insurance claim must be rejected on ground that all the related documents are from 1990–December 2013 when the property was only acquired by the respondent in 2012;

(e) the respondent is not entitled to claim for legal fees of RM1,172,791.26 because there was no costs awarded by the High Court and the Court of Appeal to the respondent. Under O 59 r 1 of the Rules of Court 2012, 'costs' includes fee, charge, disbursements, expenses and remuneration;

(f) the alleged loss and damages claimed by the respondent is too remote. The appellants cannot be held responsible because it is not foreseeable on their part that the failure to register the seizure and vesting right over the property would result in the property been auctioned off and bought by the respondent and later sold it to the third party; and

(g) the respondent failed to mitigate the loss.

[26] The learned judge having considered the evidence and submissions of parties, made his finding that the respondent is entitled to all her claims as shown above with the total amount awarded is RM9,396,088.86. The finding of the learned judge is at para 27, p 19–26 of the grounds of judgment (see pp 28–35 of the *rekod rayuan tambahan* (*Bahagian* A).

OUR DECISION

[27] The appellants in the submissions made a second attack on the respondent's claim relying on the same grounds raised at the High Court as mentioned in the above paragraphs. We will examine the learned judge's

decision whether the finding on the assessment of damages was erroneous based on the appellants' complaint and that the respondent's claim are wholly baseless, without sufficient evidence, unreasonable and contain an element of double counting.

[28] The general rule as to the measure of damages is that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation. When a plaintiff claims damages from a defendant he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable. And the plaintiff must prove their damage. Where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can. General difficulty of proof does not dispense with the necessity for proof. The case of *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19 is cited.

[29] In *Liew Choy Hung v Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309; [1997] 2 CLJ 601 the court held that the general rules underlying the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract.

[30] In this case, it is not disputed that the respondent gave evidence and tendered documents marked as exhs P1–P11 to support the claims. She has taken step to mitigate her loss. It was submitted that no rebuttal evidence was led by the appellants. The learned judge accepted the respondent's evidence in toto and gave judgment to all the claims prayed for by the respondent. In some of the claims, there is no clear evidence that the respondent had proved the claims and no clear explanations or reasons why the claims were awarded.

[31] The appeal is by way of rehearing. Section 69 of the Courts of Judicature Act 1964 provides that appeals shall by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court. The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

[32] The courts had held that the appellate court may interfere with an award of damages if satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a

wholly erroneous estimate of the damage suffered.

[33] Based on the evidence adduced and the facts of the case, we examined the learned judge decision on the assessment of damages and gave our views as follows:

(a) deposit paid by the respondent at the public auction — RM351,000:

We agreed with the appellants that the respondent is not entitled to the claim for the 10% deposit of RM351,000. Having perused the respondent's amended statement of claim, we found the amount claim is quite confusing. For example, in para 4, it was pleaded that she paid the auction price of the property for RM3,510,000, while in para 7, the 10% deposit amount pleaded is RM351,000 and in the particulars of loss and damage, the amount pleaded is RM350,000. Even the learned judge also got it confused when he awarded the amount as RM351,000 which was not the amount prayed for. We thought maybe it is a typo error, but surprisingly, the respondent's evidence in court during cross-examination stated that she bought the property for RM3.15m. The mistake if any was never corrected during the re-examination. At the same time there is no contemporaneous documents to confirm the exact amount. In such a case, it must be accepted that the 10% deposit was RM315,000 following the respondent's evidence in court. Clearly, the amount pleaded, prayed for and the evidence given were different which gave rise to confusion. The learned judge also failed to explain the differences in the amount in his grounds of judgment or failed to find that the respondent failed to prove the exact amount:

> PW1: I bought RM3.1 and then I get 90% loan. This one is my second property that's why I get 90%.
>
> P/Def: 90%?
>
> PW1: RM3.15 million. It should be RM3. Something million. (See notes of evidence at p 28 of the *rekod rayuan tambahan responden*.)

This is consistent with the loan of RM3,211,900 she took from the bank inclusive of legal documentation costs and other expenses imposed by the bank. The facility agreement was executed on 20 September 2012.

The 10% deposit is a pre-conditioned term in an auction sale which must be paid in order to qualify the respondent as a bidder. It is not disputed that she had successfully bid for the property on 18 June 2012. Auction is very generally defined as a sale to the highest bidder, and this is the usual meaning. A sale by public auction shall be complete when the auctioneer announces its completion by the fall of the hammer. A sale being concluded at the fall of the auctioneer's hammer could only refer to

that stage of the transaction of sale when there is concluded an agreement between the vendor and the highest bidder.

In this case, it cannot be disputed that there is evidence that the property was transferred to her name which enable her to get 90% loan from Alliance Islamic Bank to part-finance the purchase of the property. The property was charged to the bank as security for the said loan on 30 October 2012. The loan taken was paid to the senior assistant registrar of the High Court on 2 October 2012 with the 10% deposit which was paid earlier to settle the full purchase price of the property. In other words, she had enjoyed the right to bid for the property and eventually successful in buying the property.

In awarding this amount the learned judge referred to the redemption statement (exh SK3) issued by bank officer Sugumaran a/l Kasi dated 4 December 2018 (exh P11). We found exh SK3 is nothing to do or is not related to the 10% deposit amount of the auctioned property. It is purely a redemption statement issued by the bank. It is also held that the respondent is entitled to the claim of the deposit because she did not get any benefit when she had lost the property to BOP. This decision is made without due regard to the other claim by the respondent for the loss of profit on the resale of the property. If both claims are allowed it will profit the Respondent which the law does not allow.

In *Subramaniam a/l Paramasivam & Ors v Malaysian Airlines System Bhd* [2002] 1 MLJ 45; [2002] 1 CLJ 230, the court held that:

> In attempting to measure the damages that may be awarded to the plaintiffs, two basic principles of assessment must first be understood. The first is with respect to its function. As Lord Blackburn said in *Livingstone v Rawyard Coal Co* [1880] 5 App Cas 25 at 39, damages is:
>
> > That sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.
>
> The second is a corollary of the first — that in awarding damages, the plaintiff should not be allowed to profit by it ...

Based on the above reasons, the 10% deposit amount cannot be claimed as part of her loss. There is no loss and without paying the 10% deposit she would not be entitled to bid for the property. In our considered opinion, the assessments made by the learned judge on this claim is without any basis and wrong;

(b) loss of profit for the resale of the property — RM3.69m:

We agreed with the learned judge in allowing this amount. There is a sales and purchase agreement ('S&P') executed between the respondent and Lai Siew Fah dated 19 December 2012 to sell the property at RM7.2m (exh P1).

The appellants' argument is that the loss of profit for resale of property cannot be claim on the basis that the respondent's claim is more for wasted expenditure. The respondent can only claim the amount spent in order to buy the property or alternatively, the loss of profit is caused by her own fault by giving wrong representation to the buyer, Lai Siew Fah.

Further, it was argued that the selling price of the property at RM7.2m is very unrealistic on 19 December 2012 when the property was only bought on 18 June 2012 barely within six months. Therefore, the value of the property cannot shoot up suddenly from RM3.5m (RM3.15m) to RM7.2m with an increased of 51% in value. It was submitted that, the most the respondent can claim is the wasted expenditure for revoking the S&P. In the circumstances, it was submitted that the amount of compensation claim at RM3.69m is unreasonable and the order of the learned judge in allowing this amount must be set aside.

In our view 'wasted expenditure' has been clearly explained that it applies to breach of contract between the contracting parties. See: *Anglia Television Ltd v Reed* [1971] 3 All ER 690; [1972] 1 QB 60, *Sime UEP Properties Bhd v Woon Nyoke Lin* [2002] 3 CLJ 719 and *Yeoh Eng Kong v Choo Kok Yeow & Anor* [2019] 9 MLJ 112; [2018] 1 LNS 808. The situation in the present case is different, where the claim for damages arises from tort of negligence. Be that as it may, the respondent chose to claim for the loss of profit.

The appellant submitted that the loss of profit is caused by her own fault by giving wrong representation to the buyer, Lai Siew Fah. We were of the view that this argument should fail because when the hammer falls at the auction, she was declared the successful bidder and have right over the property which the title of the property eventually transferred into her own name. There is evidence that she obtained the consent from PDRM to remove the registrar's caveat and also the private caveat which was successful. Therefore, as far as she is concerned, her title to the property during the material time is indefeasible under the National Land Code. There cannot be a contributory negligence or wrong representation on her part since the issue of negligence has been decided wholly against the appellants.

It cannot be disputed that the S&P is valid and a stamped document. The respondent is a real estates agent whose profession is to buy and sell properties. She could have claimed for the selling price of RM7.2m irrespective of the increased in value. The selling price by respondent and

purchase price accepted by Lai Siew Fah at RM7.2m is a price of a willing seller and willing buyer situation. However, the respondent only claimed the amount less her purchase price. In our view, when she bought the property at RM3.5m (RM3.15m) for investment, later lost it on the negligence of the appellants, then the loss in value of the property requested at RM3.69m is a very reasonable amount which must be granted as compensation.

We agreed with this amount of damages awarded by the learned judge.

We also agreed with the learned judge's finding s 51(2) and (3) of the AMLATFA 2001 is a mandatory provisions and the failure to forthwith endorse the restriction/prohibition of dealings with the property on the issue document of title upon receiving the notice of seizure is an offence under the Act. Such failure may also cause huge loss to the public, such as the respondent in this case for not able to own the property. In this case, it is the appellants who had failed to enter such endorsement in the issue document of title. In effect it is their duty as the Registrar of Land Title conferred with the power to make such entry. Therefore, the argument that there is no forseability of the matter which gives rise to a claim for compensation and damages in our view is without justification and misconceived.

It was held in the case of *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713; [2012] 3 CLJ 271 as follows:

> [26] The maintenance of land registry that is efficient and maintains accurate particulars is a duty that the first defendant owes to every member of the public who makes and relies on a search made at the Land Registry maintained by the first defendant. If this confidence is jeopardised that could have dire consequences for trade and economic activity in this country.
>
> ...
>
> [34] By this judgment it is hoped that the short comings and irregularities arising in this transaction can be rectified to ensure there isn't a repeat performance of what has happened, the consequence of which would deprived a registered owner of land to his property which for many would have been a struggle to earn and pay for their land.

(c) monthly payment to the bank as at 3 December 2018 — RM1,139,986.55;

(d) outstanding balance of financing with the bank — RM2,912,272.01 (redemption statement):

We agreed with the appellants that the respondent cannot claim the above stated damages. Both the total sum paid to towards the facility (RM1,139,986.55) and the outstanding balance of financing of

RM2,912,272.01 (redemption amount) appears in exh SK3. The learned judge granted these claims to the respondent as appears in the order however, there is no reason or explanation given in his grounds of judgment on why he allowed both amounts. Clearly there was no assessment made on these two claims.

When the learned judge failed to state the reasons for awarding such damages, although the amounts appear in the redemption statements issued by the bank in exh SK3 and based on the facts and circumstances of this case, we must ask whether the claim is justified. In our view the claim is not justified on the grounds that the total payment RM1,139,986.55 which she already paid to the bank as at 31 December 2018 is her own obligation under the loan facility agreement in order to purchase the property. Without the loan to pay the purchase price, she may not be able to complete the purchase of the property and the 10% deposit paid in the auction would be forfeited. In such case, the issue of loss of property would never happen and claim for damages would never arose. She cannot even resell the property. In other words, the loan she took gave her the advantage of owning the property thus gave her some basis to claim for other losess.

Apart from the claim for the redemption amount or the outstanding balance of financing of RM2,912,272.01 was not assessed by the learned judge, even though the amount is stated in exh SK3, there is no evidence that the respondent had made such payments or had redeemed the property. There is also no evidence that the respondent had written to the bank requesting for payments to be discontinued on ground that the property was seized under AMLA and she is no more the owner of the property. Logically speaking, the property having been assigned and charged to the bank, the bank as the chargee should be concerned regarding the seizure of the property. There is no evidence to show that the bank knew about the seizure and that the respondent had settled the redemption amount.

the appellants submitted that the respondent may commence action against Ewe Chooi Lian and Lee Kam Sun whom the bank had paid the loan amount to and received as the purchase price of the property to recover the money back. It was further submitted that since the redemption amount is a special damages which must be strictly proved, and in this case, there was no evidence or prove that it has been paid, therefore, the claim for redemption amount should fail;

(e) stamp duty on purchase value of the property — RM99,300:

We also agreed with the appellants that the respondent had made a double claim for stamp duty of RM99,300 on the purchase of the property. This amount already included in the lawyer's bill dated 12

September 2012 (see at p 202 of the *rekod rayuan* (*Bahagian* C). Therefore, it should not be awarded separately. It would remain as the amount claim under the payment for lawyers' fee;

(f) costs for maintenance of the property — RM30,739.04:

We agreed with the appellants' submission that the costs for maintenance of the property must be rejected on ground that all the related documents are from 1990–December 2013 when the property was only acquired by the respondent in 2012. The documents related to the claim is found at pp 192–197 of the *rekod rayuan bahagian* C (exh P4).

The appellants submitted that the respondent failed to prove that the costs of RM30,739.04 were incurred by her. The bills at pp 192–197 clearly issued in the name of Dato' Edmond Lee Kam Sun and not under her name. Logically speaking, the costs cannot be incurred by her when the property was only obtained in 2012. The document referred at pp 189–199 is under the name of S Daljit Singh s/o Sarjit Singh. The claim for cost of maintenance is very suspicious and there is no evidence that it relates to the respondent.

The learned judge did not make any reasonable finding except by accepting the bills on the face value just because the bills were tendered as exhibit. In our view, the learned judge should have considered the appellants' complaint and verified the dates on the documents to ensure the claims made were correctly made based on the dates the property was bought by the respondent. An award of damages cannot be blatantly given without ascertaining whether the respondent is entitled to the amount claimed in the first place, otherwise it may wrongly enrich the respondent and caused injustice to the appellants;

(g) payment for legal fees — RM1,172,791.26:

We affirmed the award by the learned judge because the amount had been agreed between the respondent and her lawyer to do the legal work for her. The lawyers' invoices at pp 206–214 clearly show that the invoices were addressed to her which means she has to pay or had paid the amount stated in the invoices (exhs P6, P7, P8, P9).

We did not agree with the appellants' suggestion that the overall fees were only RM321,142.18 based on the invoices at pp 202, 204, 205, 206, 207, 208 and 209 of the *rekod rayuan Bahagian* C. As alluded to earlier, the amount stated in the invoices at those pages must be awarded as cost incurred by the respondent. The amount RM321,142.18 suggested by the appellants fell short of the amount RM925,000 which was agreed as legal fees and getting up amount for the lawyer in Shah Alam High Court Civil Suit No 21 NCVC-25–06 of 2015, Shah Alam High Court Originating Summons No 24–916–07 of 2012 and Court of Appeal

Civil Appeal No B-02 (A)-900–06 of 2015. The agreement is at pp 210–214 of the *rekod rayuan Bahagian* C (exh P10).

CONCLUSION

[34] We were satisfied that the learned judge had acted on a wrong principle of law, misapprehended the facts, made a wholly erroneous estimate of the damage suffered on certain claims as deliberated above. We found there is merit in the appeal. It is our unanimous decison that the appeal is partly allowed that the respondent is only entitled to claim for loss of profit in the amount of RM3.69m and the payment of legal fees in the amount of RM1,172,791.26. The whole amount of damages awarded is RM4,862,791.26 to the respondent. We set aside the order of the High Court on other damages that was allowed by the learned judge. We award costs of RM5,000 to the appellant.

Appeal allowed in part with costs of RM5,000 to appellants.

Reported by Dzulqarnain Ab Fatar